

To: File
From: Michael Jensen, DOE GC-71
Date: August 16, 2010
Re: Ex parte discussion with Michael Lubliner

On July 28, 2010, Michael Jensen (GC-71), Harry Indig (EE-2J), and Bob Lucas (PNL) spoke with Michael Lubliner regarding his views on DOE's proposed rulemaking to develop energy efficiency standards for manufactured housing.

Mr. Lubliner was supportive of HUD's initiatives to regulate manufactured housing and was enthusiastic about DOE's mission to improve the energy efficiency of homes. He supported the idea, in theory, of having one process—via design approval primary inspection agencies (DAPIAs) and production inspection primary inspection agencies (IPIAs)—to ensure compliance with both the HUD Code and proposed DOE regulations. However, he noted that the HUD process of third-party certification of manufactured homes had room for improvement. He also noted the discussions on the manufactured housing consensus committee and at HUD regarding perceptions of inherent conflict of interest in the manufacturer-DAPIA/IPIA relationship (see attached HUD May 20, 2008, memorandum).

Mr. Lubliner suggested that it would be useful for DOE to perform an independent assessment of how well the DAPIA/IPIA process is working for HUD before deciding whether to adopt a similar DOE inspection program. Mr. Lubliner recommended that DOE conduct a random survey of how to adjust the quality assurance (Q/A) process to ensure compliance with DOE's proposed energy efficiency standards. He identified that the DAPIAs and IPIAs often do not have clear guidance on how to perform inspections (e.g., there currently is no clear guidance on how ducts, envelope penetration, etc. should be sealed).

Mr. Lubliner also advocated that DOE implement factory and after set-up Q/A protocols for the testing of manufactured homes, using common building science testing tools employed in DOE and EPA residential energy efficiency programs. Mr. Lubliner noted DOE Building America, NIST, and other research suggesting that implementation of these protocols will help ensure healthier, more durable, and energy efficient homes in accordance with existing and future MHCSS requirements. These tools include:

- 1) Blower doors and thermal imaging equipment to help confirm the correct installation of insulation and air leakage control systems associated with the home's thermal envelope.
- 2) Duct leakage testing equipment to ensure duct tightness Q/A targets are met.
- 3) HVAC air flow testing/commissioning of mechanical ventilation systems to ensure that Q/A targets for bath and whole house fans air flow rates are met.

4) Heating and AC system air flow rate testing to ensure that Q/A targets for return and supply register air flow requirements are met.

He also suggested that DOE consider providing technical assistance to state administrative agencies responsible for after-market consumer complaints on how to check for energy efficiency problems in homes.

Mr. Lubliner also mentioned that DOE consider discussions with HUD's contractor responsible for DAPIA/IPIA Q/A processes (i.e., IBTS) to oversee certain energy efficiency inspections. He noted that the manufactured housing industry is not self-supporting, as Congress envisioned, since labeling fees amount only to \$39 per floor and there are currently low production rates, hence less revenue to implement all aspects of HUD's manufactured housing program. He suggested that, if costs were increased, money could be put towards enhancing the Q/A process. Finally, Mr. Lubliner re-stated that he was supportive of the DAPIA/IPIA inspection process in conjunction with DOE performing random third-party and manufacturer audits and inspections.

End of conversation.




U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

MAY 20 2008

OFFICE OF HOUSING

MEMORANDUM FOR: Manufactured Housing Consensus Committee

FROM: 
William W. Matchneer III, Associate Deputy Assistant Secretary
Regulatory Affairs and Manufactured Housing

SUBJECT: PIA Related Issues for the Consensus Committee to Consider

In recent months, the program office at HUD has been analyzing its working relationships with the various HUD-approved Primary Inspection Agencies (PIAs), especially the private PIAs that are in contract with and paid directly by the manufacturers. We believe that the PIAs' performance as inspection agencies for HUD, as well as HUD's working relationships with these PIAs, could be significantly improved if the regulations regarding PIAs were revised. HUD is asking the committee to consider the following issues to help it develop potential regulatory changes to address them. At this time we are not proposing specific regulatory language, only asking that the committee members think these issues through with us.

Background Summary

As authorized by the National Manufactured Housing Construction and Safety Standards Act of 1974 (the Act), HUD published the procedural and enforcement regulations in 1976 (24 C.F.R. § 3282). These regulations set forth procedures by which the Secretary of HUD "conduct[s] inspections and investigations necessary to enforce the standards, to determine that a manufactured home fails to comply with an applicable standard or contains a defect or an imminent safety hazard, and to direct the manufacturer to furnish notification thereof, and in some cases, to remedy the defect or imminent safety hazard." 24 C.F.R. § 3282.1(b). One of the key listed purposes of the Act is "to ensure uniform and effective enforcement of Federal construction and safety standards for manufactured homes." 42 U.S.C. § 5401(b)(7).

The general purpose of the Act is to provide for a single uniform standard for manufactured housing safety and construction throughout the United States. Accordingly, HUD published the Manufactured Home Construction and Safety Standards (construction and safety standards) in 1976 (24 C.F.R. § 3282). In the Manufactured Housing Improvement Act of 2000, Congress codified definitions of the two types of "Primary Inspection Agencies" (PIAs) that were originally created by the regulations to perform certain regulatory tasks. First, Congress defined "Production Inspection Primary Inspection Agencies" (IPIAs) as "[s]tate agenc[ies] or private organization[s] that ha[ve] been approved by the Secretary to evaluate the ability of manufactured home manufacturing plants

to comply with approved quality control procedures and with the Federal manufactured home construction and safety standards promulgated hereunder, including the inspection of homes in the plant.”¹ Second, Congress defined “Design Approval Primary Inspection Agencies” (DAPIAs) as “[s]tate agenc[ies] or private organization[s] that ha[ve] been approved by the Secretary to evaluate and either approve or disapprove manufactured home designs and quality control procedures.”²

As mentioned above, PIAs were originally created by HUD regulations to perform necessary regulatory tasks that HUD would not have the staff or budget to perform itself. Once approved by HUD, these third-party agencies are responsible for day-to-day oversight of design and construction of manufactured homes. The regulations allow states to serve as PIAs. The regulations also allow private organizations to serve as PIAs, and specifically allow manufacturers to hire and pay those organizations without any restrictions. While this delegation of inspection responsibility has reduced program costs for the government, it is the program office’s opinion that the regulations have also established a system of often conflicting interests that in HUD’s experience have discouraged private PIAs from performing in the best interest of the consumer and prevented private PIAs from providing HUD with inspection information it needs to ensure uniform and effective enforcement of the construction and safety standards.

The Current Regulations

PIAs are specifically responsible to HUD for assuring compliance with the construction and safety standards by: reviewing and approving all manufactured home designs; reviewing and approving all plant quality control plans; and performing regular production surveillance of all plants. At the same time, private PIAs must compete for contracts with several manufacturers, and the manufacturers have absolute authority to hire or fire them. It should, perhaps, come as no surprise that no private PIA has ever come forward voluntarily to HUD with information regarding defects in design or production. Furthermore, the direct employment relationship between manufacturers and PIAs has led some in the industry to believe that the interests of the PIA and manufacturer are actually joined. For example, some attorneys have found it acceptable to represent both a manufacturer and its PIA with regard to the same compliance issue.

Without compliance information from the PIAs, HUD must rely on an independent contractor for most of its fact gathering and other oversight information. However, this contract is only for monitoring of PIA performance, and the monitoring is only done on an occasional basis. The contractor is not in a position to provide HUD with the first-hand compliance information it needs to fully discharge its statutory responsibility for industry oversight. HUD has found that, in practice, private PIAs are more likely to act as referees between their manufacturers and the contractor than as regulatory inspectors. HUD has also found that some private PIAs believe they have independent discretion to decide compliance issues. For example, Section 3282.362(c) allows IPIAs to distribute HUD compliance labels and to make determinations as to whether a manufacturer is properly performing under its approved quality assurance manual. Some IPIAs

¹ 42 U.S.C. § 5402(21).

² 42 U.S.C. § 5402(18).

believe that this authority is independent of HUD and that HUD cannot direct an IPIA to take specific actions when performing these duties. While the regulations allow IPIAs to engage in these actions, the ultimate decision on all compliance issues plainly remains with HUD as the statutory regulator.

Some Possible Revisions to the Regulations to Address the Concerns

Congress was obviously concerned about the identification of defective and unsafe homes, as Section 621 of the Act establishes civil and criminal penalties for any failure to report violations of the construction and safety standards. Despite this strong statement from Congress, HUD regulations do not require PIAs to inform HUD of defects they find in the homes they inspect or deficiencies in a plant's quality control. The only PIA reporting requirement is found in 3282.553(c), which simply requires IPIAs to submit monthly reports of the number of homes with a failure to conform or an imminent safety hazard found in each plant.

In order to encourage PIAs to provide HUD with compliance information, the program office has been considering revisions to the procedural and enforcement regulations to ensure that PIAs both can and will provide HUD with objective and independent evaluations of a manufacturer's operations without risk of retaliation. Specifically, HUD suggests strengthening 24 C.F.R. §§ 3282.362 and 3282.366(a) to include the requirement that PIAs provide timely reports of violations of the construction and safety standards and imminent safety hazards to HUD.

The program office welcomes recommendations from the Committee with regard to how the regulations can be amended to address the conflicting interests HUD established in the current system. Options might include new provisions regulating how PIAs can be hired, fired and/or paid by the manufacturers. The regulations could be amended to require the approval of HUD before a manufacturer hires a new PIA or to place restrictions on the firing of PIAs by limiting the reasons that a manufacturer can end its employment relationship with a PIA at a given plant. This second option might require that PIAs can only be fired for cause on a plant-by-plant basis, and remove the PIAs' concern that they could be fired in retaliation for reporting violations at one plant.

The program office also suggests amending the regulations to impose more stringent reporting requirements regarding class determinations. Pursuant to 24 C.F.R. § 3282.366(a), IPIAs are responsible for assisting the Secretary in identifying classes of homes that have been affected where the Secretary makes or may be contemplating making a preliminary determination with respect to the homes for which the IPIA provided the plant inspections. Additionally, the IPIA is responsible for reviewing manufacturer determinations of a class of affected homes when the manufacturer acts pursuant to 24 C.F.R. § 3282.404, and the IPIA must concur in the method used to determine the class of potentially affected homes or state the reasons for its nonconcurrence.³ In practice, IPIAs generally concur with the class determination methods of the manufacturer. However, HUD has found that the methods used have frequently been inadequate and that the IPIA had not reviewed the determinations with a critical eye. Though the regulations currently require

³ 24 C.F.R. § 3282.366(b).

IPIAs to state why a method is inadequate the regulations could be amended to require an IPIA to report in detail the reasons it believes that a manufacturer's class determination method is either adequate or inadequate. In addition, an IPIA could be required to concur or non-concur on the class of homes identified in addition to the methods used to determine that class.

Plant Certification

The regulations set forth the process by which an IPIA performs the initial evaluation of the quality control in a plant to determine whether the manufacturer is capable of producing homes in conformance with the approved design and the standards and to determine whether the manufacturer's quality control procedures will assure that such conformance continues.⁴ However, HUD's review of recent plant certifications indicates that IPIAs are focusing their quality control evaluations on a single unit passing through the production process without design or production defects being observed. The current regulations recognize this as only one measurement of a plant's quality control procedures, and HUD believes the regulations should make it clear that IPIAs are required to evaluate all aspects of a plant's quality operations during the certification process.

Once an evaluation is completed to the IPIA's satisfaction, the regulations require the IPIA to prepare and deliver a "certification report" to the manufacturer, HUD and HUD's monitoring contractor.⁵ Once this certification report is delivered, ordinary production can begin under the IPIA's surveillance, even though HUD has had no opportunity to review and approve the certification report or determine if the level of production and staffing under which the certification report was issued have been included. Although some in the industry have interpreted this to mean that IPIAs have independent plant licensing authority, statutory authority for plant licensing is ultimately retained by HUD. While HUD believes that it has the inherent right to review and approve certification reports, we would recommend potentially amending the regulations to specifically condition plant certification on HUD's review and approval of the certification report. HUD also suggests amending the regulations to clarify that although ordinary production can begin upon the delivery of an IPIA's certification report, HUD retains the right to review the certification report and conduct an in-plant certification audit. The regulations would then clearly state that HUD will either approve the certification or require specific improvements to the plant's quality control. Finally, consideration should be given to amending the regulations to specifically condition plant certification on the level of production and staffing that was in place and observed by the IPIA during the certification process.

⁴ 24 C.F.R. § 3282.362(b)(1).

⁵ 24 C.F.R. § 3282.362(b)(2).

Potential Remedies for Underperforming PIAs

Under the Regulations, if an IPIA or DAPIA is underperforming, HUD can revoke its certification and prohibit it from participating in the Manufactured Housing Program. However, if an IPIA is only performing poorly at one or two manufacturing plants, or a DAPIA is performing poorly on only one or two design packages, it may not always be prudent to revoke that PIA's approval to participate in the program. Not only would this require all manufacturers to hire new PIAs, but it would also require manufacturers to bear the expense of recertifying all affected plants and/or design packages. HUD would prefer to hold PIAs accountable for the individual plants and design packages for which they are responsible. HUD already has broad authority to monitor a PIA's performance and determine whether the PIA should be disqualified from the program or that the PIA make specific improvements to their operations in order to continue to be approved. Though HUD believes this authority is inherent to the Act and current regulations, consideration should be given to amending the regulations to set forth the specific actions that HUD could take against an underperforming IPIA or DAPIA. Examples of specific forms of action could include: assessment of civil penalties; restriction on client growth; requiring IPIAs to perform increased inspections in problem plants; removal of DAPIAs from specific design packages that contain numerous errors; and removal of IPIAs from specific plants where their production oversight is ineffective.

Label Recovery

The regulations currently have no procedures assigning responsibility for the recovery of HUD labels. This recently became a problem when several new manufactured homes that were severely damaged by flooding caused by Hurricane Katrina were purchased from insurance salvage and sold as used homes to unwary purchasers. Though the manufacturer was on notice that the homes had been severely damaged and treated as total losses by the insurance carrier, the regulations did not require the labels be removed. The program office suggests amending the regulations to stipulate that retailers, distributors, or other parties cannot sell such homes and that to do so would subject the party to civil and criminal penalties under the Act. This would include homes that are known to be severely damaged in a natural disaster or during transportation and cannot be repaired, and homes from manufacturers who have lost their plant certifications or gone out of business. Manufacturers, retailers, or distributors should be required to notify HUD and the IPIA that issued the label that it has a home or group of homes in its possession that meets the above criteria. The IPIA or its designee would then be required to remove the label and return it to HUD or to HUD's agent.